Supreme Court, U.S.
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No. 01-1609

# In the Supreme Court of the United States

INDIAN RIVER ESTATES AND
DUANE J. TILLIMON,
*Petitioners*,

v.

PREFERRED PROPERTIES, INC.,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## RESPONDENT'S BRIEF IN OPPOSITION

### Reasons for Denying Petitioners' Writ

The facts and law of the case do not present any jurisdictional conflicts, nor do they present any special or compelling reasons that would invoke the United States Supreme Court's discretionary jurisdiction over Writs of Certiorari. Petitioners' Writ of Certiorari fails to provide any basis, as to any issue presented, upon which the Supreme Court should grant review.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10 (2001). The Supreme Court is not the appropriate court to address errors in individual cases. *See* Andrew L. Frey, Kenneth S. Geller, *et al.*, Opposing Cert: Addressing the Issues Presented, Inside Litigation, Vol. 1, No. 7, 26 (May 1987)(hereinafter "Frey, Inside Litigation"). Rather, the Supreme Court reviews cases to maintain uniformity in federal law. Petitioners have not identified any lack of uniformity among the circuits regarding individual *voir dire*. Petitioners' Writ merely states speculative and illusory disagreement regarding the issues presented.

Petitioners also petition the Supreme Court to review issues arising under state law in the hope that those errors will require a retrial on all issues, even the federal claims. This is not the function of the Supreme Court. The Supreme Court does not grant review with the intent of achieving justice in individual cases arising under state law, and should not grant review of Petitioners' Writ.

## I. Petitioners' request for the Supreme Court to adopt a rule of *per se* prejudice is not an appropriate issue for review by the Supreme Court where there is no conflict among the circuits.

Petitioners' first and second issues do not suggest a conflict among the circuits. Petitioners request that the Court "adopt a *per se* rule" that it is prejudicial to conduct individual *voir dire* examination at the bench without the personal presence of the defendant following a general examination in open court. *See* Writ at 7. Without any jurisdictional conflict and no presentation by Petitioners that this is a compelling and significantly important issue, such a request is not properly before this Court and review of the request should be denied.

The Court of Appeals held that any error in the jury selection process here was harmless. Harmless error analysis is appropriate and common when reviewing discretionary decisions of trial courts. Petitioners ask this Court to limit such harmless error analysis by adopting a *per se* rule of prejudice when error occurs in *voir dire* proceedings. No other federal court has suggested the need for a *per se* rule of prejudice in *voir dire* proceedings. Petitioners cite no case law indicating there is any jurisdictional conflict.

A court has discretion to conduct individual *voir dire* examination *in camera*, with counsel present, when the interrogation 'touches deeply on personal matters that person has legitimate reasons for keeping out of the public domain." *See Press Enter. Co. v. Superior Court of California*, 464 U.S. 501, 511 (1984). Where the district court has erred in the application of that discretion, it is still appropriate to determine whether the error prejudiced any litigant. The case law reporters are filled with instances where individual *voir*

*dire* examination, conducted with the defendant's attorney present and following general open court examination, is non-prejudicial, harmless error. No court has suggested that prejudice must be presumed. Without a serious conflict among the circuits on the question presented, a petition on this issue should be denied.

## II. The Sixth Circuit properly found that the individual *voir dire* examination in this case was harmless error.

The Supreme Court should deny Petitioners' request for review of whether it was harmless error to conduct individual *voir dire* examination because the Court of Appeals correctly determined the error was harmless and Petitioners do not state any basis under Supreme Court Rule 10 for granting review. Petitioners do not argue that the Sixth Circuit's determination of harmless error conflicted with that of any other court of appeals or state court of last resort, nor could they do so. The Court of Appeals correctly found the individual *voir dire* examination to be harmless, consistent with settled law.

The right to participate in *voir dire* is a basic constitutional right. *See Helminski v. Ayerst Labs*, 766 F.2d 208, 213-14 (6th Cir. 1985). "A court may not exclude arbitrarily a party who desires to be present merely because he is represented by counsel; such exclusion would violate the due process clause of the Fifth Amendment." *Id.* It is settled law, without conflict in any jurisdiction, that a . . . court has "broad discretion" to conduct voir dire and empanel a jury. *See U.S. v. Middleton,* 246 F.2d 825, 834 (6th Cir. 2001). Reversal is warranted only where the process used by the court could result in an unfair trial. *See id.*

Here the District Court and counsel conducted both general *voir dire* examination in open court, and individual examinations at the bench, the latter out of earshot of other prospective jurors and the parties. The individual examinations generally inquired into personal medical issues, as this case involved alleged discrimination based on handicap. Counsel for the parties were given free reign to inquire on such issues.[1]

The Sixth Circuit's determination of harmless error is consistent with those from other jurisdictions which have addressed the issue. Courts have found individual examination harmless where the defendant was present for the entire jury selection process, most of the questions were asked and answered in open court, and the defendant's counsel participated in the questioning at the bench. *See Sanchez v. Duncan*, 282 F.3d 78, 83 (2nd Cir. 2002). *See also U.S. v. Feliciano*, 223 F.3d 102 (2nd Cir. 2000); *U.S. v. Cuchet*, 197 F.3d 1318 (11th Cir. 1999); *U.S. v. Tipton*, 90 F.3d 861 (4th Cir. 1996) (only absences throughout the entire *voir dire* process would not be harmless error); *U.S. v. Brantley*, 68 F.3d 1283 (11th Cir. 1995); *U.S. v. Yonn*, 702 F.2d 1341 (11th Cir. 1983); *U.S. v. Alessandrello*, 637 F.2d 131 (3rd Cir.

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[1] In their Questions Presented, Petitioners suggest that the District Court "refused" to permit them to listen to individual *voir dire* examination. In fact, counsel for Petitioners objected to his client not being up at the bench, but articulated no legal basis for the objection. He said only "My client feels left out by not being able to participate at this level," Writ at 41a, which he eventually articulated in the Court of Appeals to be a due process violation. The District Court may well have exercised its discretion to allow Petitioners' personal participation at the bench if counsel had articulated a basis for objection other than "my client feels left out."

1980); *U.S. v. Crutcher*, 405 F.2d 239 (2nd Cir. 1968) (only absences throughout the entire *voir dire* process would not be harmless error). These cases parallel the case at bar. Petitioners were present during the entire *voir dire* process and heard most of the questions and answers in open court. Additionally, Petitioners' attorney was present during all individual examinations.

The Court should decline the invitation to review the Courts of Appeals' decision that any error occurring in the *voir dire* process in this case was harmless.

## III. Petitioners' Writ of Certiorari lacks a basis for granting Supreme Court review on the "two-issue" rule.

The Court of Appeals fully addressed and affirmed the jury's verdict on the federal fair housing claim. It therefore declined to delve into the thorny state law question; i.e., whether under the Ohio Statute of Frauds the time for performance under a written option to purchase real estate can be extended orally.

The court should not grant a Writ to review this question. Matters of purely state law are beyond the reach of this Court's discretionary review. Moreover, the jury was instructed separately on the state and federal law claims, and made separate findings of liability on each claim. Petitioners never objected to the submission of a general verdict form accompanied by written interrogatories, a procedure authorized under Civil Rule 49(b). There is no reason to address the issue because the jury's verdict on the federal fair housing claim was upheld by the Court of Appeals.

Petitioners attempt to cast the issue as a federal procedural one. Petitioners ask the Court to review the Court of Appeals' decision because the so-called "two-issue rule" has been discredited and the Supreme Court has decided it "is not applied in federal court." *See* Writ at 8. *See also Wilmington Mining Co. v. Fulton*, 205 U.S. 60 (1907).

But Petitioners also admit that "this is not a traditional two-issue case." Writ at 9. They acknowledge that "the two-issue rule has no application where the jury makes specific findings of liability as to both issues," as it did in this case. Writ at 8. Petitioners further acknowledge that the inapplicability of the "two -issue rule" "is established in federal law." *See id. See also Baltimore and Ohio R.C. v. Reeves*, 10 F.2d 329, 330-31 (6th Cir. 1926). In so stating, and string-citing conforming cases from various jurisdictions, Petitioners admit the proposition that there is no jurisdictional conflict which would necessitate granting review of this issue by the Supreme Court.

Petitioners ask for the Supreme Court to "correct" the Court of Appeals' decision and to prevent appellate review from "remain[ing] tainted" and to "enforce" the proper rule. *See* Writ at 7. This is an improper request of the Supreme Court's discretionary power of review. The Supreme Court does not grant review with the intent of achieving justice in individual cases.

At the end of the Petition for Writ of Certiorari, Petitioners throw in two undeveloped issues upon which it requests review. The first is in regard to the District Court's mandatory injunction requiring Petitioners to deed the property at issue to the Respondent, employing the option contract price for such transaction. The second issue is a two sentence statement about punitive damages. From the

minimal information provided by Petitioners' Writ, the Petitioners appear to base these issues on the Court of Appeals' approval of the District Court case contra to Petitioners' argument regarding the established federal law of the discredited two-issue rule. These issues are state law issues which were improperly brought on a petition for writ of certiorari before this Court.

## Conclusion

Respondent Preferred Properties, Inc., requests that the Court deny Petitioners' Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

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